IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 91 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARANBHAI UMABHAI HARIJAN

Versus

SUB DIVISIONAL MAGISTRATE,

Appearance:

MS DR KACHHAVAH for Petitioner

MR KT DAVE APP for Respondent No. 1 to 4

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 10/03/2000

ORAL JUDGEMENT

#. Rule. Mr. K.T.Dave, learned APP waives service of rule.

#. The petitioner was externed from the districts of Banaskantha, Mehsana, Sabarkantha and Kachchh for a

period of two years by virtue of order passed on 16th March, 1999 by the Sub Divisional Magistrate, Palanpur, in exercise of powers under sections 56(b) of the Bombay Police Act ("the Act" for short). It was found that the petitioner-externee committed breach of that order and entered Banaskantha district. Therefore, Sub Divisional Magistrate, Palanpur passed order on December, 2, 1999 against the petitioner-externee in exercise of section 62(2) of the Act and directed that the petitioner be arrested and kept in police custody at Porbandar jail. It is this order that has given cause for the present petition under Articles 226 and 227 of the Constitution of India by the externee, now in jail.

#. The petition is based mainly on the ground that the order is ex-facie illegal, passed without jurisdiction and outcome of of misreading of the provisions of the law.

#. Attention of this Court is drawn to section 62 of the Act and it is stated that the power with which the authority is invested is only of causing the breaching externee arrested and removed in police custody to a place outside the area as the authority may prescribe. In the instant case, the authority has caused the petitioner arrested and has placed him in Porbandar Jail for a period of two years from March 16, 1999 and therefore, the order is without jurisdiction and in gross misreading of the provisions of law.

#. Mr. K.T.Dave, learned APP has appeared for the respondents.

#. Considering the contentions raised before this Court, it is very clear that the externing authority is empowered to take action under section 62 (2) of the Bombay Police Act against an externee on breach of externment by the externee. This provision runs as under.

"62. Procedure on failure of person to leave the area and his entry therein after removal -

(1) If a person to whom a direction has been issued under section 55,56 or 57 to remove himself from an area -

(i) fails to remove himself as directed,

or

(ii) having so removed himself, except with

the permission in writing of the authority making the order as provided in sub-section (2), enters the area within the period specified in the order,

the authority concerned may cause him to be arrested and removed in police custody to such place outside the area as the said authority may in each case prescribe.

(2) The authority making an order under section 55, 56 or 57 may in writing permit any person in respect of whom such order has been made to enter to return to the area, including any contiguous districts or part thereof, from which he was directed to remove himself, for such temporary period and subject to such conditions as may be specified in such permission and may require him to enter into a bound with or without surety for the due observance of the conditions imposed. The authority aforesaid may at any time revoke at any time such permission. Any person who with such permission enters or returns to such area shall observe the conditions imposed, and at the expiry of the temporary period for which he was permitted to enter or return, or on the earlier revocation of such permission, shall remove himself outside such area, or the area and any contiguous districts or part thereof, and shall not enter therein or return thereto within the unexpired residue of the period specified in the original order made under section 55, 56 or 57 without a fresh permission. If such person fails to observe any of the conditions imposed, or to remove himself accordingly, or having so removed himself enters or returns to the area, or the area and any contiguous district or part thereof, without fresh permission, the authority concerned may cause him to be arrested and removed in police custody to such place outside the area as that authority may in each case prescribe."

The authority therefore, has power, under this provision, to get the breaching externee arrested and removed under the police custody to a place outside the area. The section does not, in any manner invest the externing authority with power of continuing the breaching externee in custody even after removal from the area. It would be erroneous to read and interpret the said provision to

empower the externing authority to send the breaching externee to jail as has been done. If this interpretation is accepted, it would amount to making the provisions of Sec. 142 of the Bombay Police Act redundant, which provide for punishment for breach of externment order.

6.1 Likewise, such interpretation of Sec. 62(2) of the Bombay Police Act would render provision of Sec. 167 of Criminal Procedure Code nugatory.

6.2 Sending a man to prison for a period of two years, without trial, as has been done is more harsh than provisions for preventive detention, where law provides detention upto six months, one year or two years as the case may be. There also, checks and guards are provided by law to protect the liberty of detenue against possible misuse. The law makers could not be taken to have intended such interpretation while incorporating Sec. 62(2) of the Bombay Police Act.

6.3 The interpretation adopted while passing the impugned order is against the basic principles of natural justice & criminal jurisprudence. The order could not have been passed without affording opportunity to the externee of being heard. A plain reading of the impugned order indicates clear breach of this canon of criminal jurisprudence.

6.4 It is also brought to the notice of the Court that an offence is registered against the petitioner under Section 142 of the Bombay Police Act for breach of the externment order. Thus, for the act of breach of externment order, proceedings are initiated. The petitioner would be dealt with in accordance with law and will be punished therefor if found guilty. As such, the impugned order of putting the petitioner in jail for two years can be said to be an order of punishment without adjudication and therefore it requires to be quashed by allowing this petition.

6.5 One more adverse effect of the impugned order, if sustained, would be that the petitioner would be punished twice, for the same act of committing breach of externment order, if ultimately he is convicted in proceedings under section 142 of the Bombay Police Act. This also cannot be permitted to happen.

#. For the reasons stated above, the impugned order directing the externee to be kept in Porbandar jail for a period of two years from March 16, 1999 is without

authority or jurisdiction.

#. The present petition is allowed. The order impugned in this petition i.e. the order dated December 2, 1999 passed by Sub Divisional Magistrate, Palanpur, in exercise of powers under Section 62(2) of the Act is hereby quashed and set aside. The petitioner - Naranbhai Umabhai Harijan, be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no order as to costs.

[A.L. DAVE, J.]

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